No. _____

SUPREME COURT OF THE UNITED STATES

Autley I. Salahuddin,

Petitioner,

vs.

Washington State Prison Warden,
Attorney General, State of Georgia

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eleventh Circuit

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

Autley I. Salahuddin
GDC-1000403289
Washington State Prison
PO BOX 206
Davisboro, GA. 31018

APPENDIX TO THE PETITION FOR
A WRIT OF CERTIORARI

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In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11673

AUTLEY I. SALAHUDDIN, II,

Petitioner-Appellant,

versus

WASHINGTON SP WARDEN,
ATTORNEY GENERAL, STATE OF GEORGIA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-05163-CAP

APPENDIX A **A-1**

ORDER:

Autley Salahuddin, II, is a Georgia prisoner serving a 50-year sentence for aggravated battery, aggravated assault, kidnapping, and drug- and weapons-related offenses. He moves for a certificate of appealability ("COA"), in order to appeal the district court's dismissal of his *pro se* 28 U.S.C. § 2254 petition as untimely. To obtain a COA, Salahuddin must show that reasonable jurists would debate both (1) whether the petition states a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Here, reasonable jurists would not debate that the district court properly dismissed Salahuddin's § 2254 petition as untimely. Because he did not file a direct appeal, his convictions and sentence became final in September 2010, 30 days after the trial court entered judgment in his state criminal case. *See Bridges v. Johnson*, 284 F.3d 1201, 1202 (11th Cir. 2002); O.C.G.A. § 5-6-38(a). Thus, absent tolling, he had until September 2011, or one year after his convictions and sentence became final, to file his § 2254 petition. *See* 28 U.S.C. § 2244(d)(1)(A).

Six months after his convictions and sentence became final, in March 2011, Salahuddin filed his state habeas petition, which tolled the federal limitations period until October 2012, when the Georgia Supreme Court dismissed his application for probable cause to appeal. *See* 28 U.S.C. § 2244(d)(2). Therefore, absent further tolling, he had an additional six months, from October 2012,

in which to file his § 2254 petition. Given that he initiated the instant § 2254 proceedings in December 2022, more than ten years after the conclusion of his state habeas proceedings, the district court properly determined that the federal limitations period had been expired for several years by the time that he filed the instant petition.

Further, the district court did not err in declining to revive Salahuddin's previous § 2254 petition, which he timely filed in 2013. Even assuming that the instant § 2254 petition could be construed as seeking relief from the dismissal of his previous petition, pursuant to Fed. R. Civ. P. 60(b), he could not show that his requests for relief under Rule 60(b) were made "within a reasonable time," because nothing suggested that he undertook any effort to ascertain the status of his previous § 2254 petition, in the nine years following its dismissal. *See* Fed. R. Civ. P. 60(c)(1).

In light of Salahuddin's failure to demonstrate that he undertook any efforts to ascertain the status of his previous § 2254 petition, in the nine years after its dismissal, he also could not show that he had "been pursuing his rights diligently," as would be necessary to demonstrate an entitlement to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010) (quotation marks omitted). He likewise could not overcome the procedural bar based on his actual innocence claim, because the psychological report that he relied upon in support of the claim did not constitute "new evidence of innocence," considering that he had sought to admit the report at his 2010 trial. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995).

Because the district court properly determined that Salahuddin filed the instant § 2254 petition several years after the federal limitations period already had expired, and because he could not overcome the procedural bar, nor demonstrate an entitlement to relief from the dismissal of his previous petition, reasonable jurists would not debate that the district court properly dismissed the instant § 2254 proceedings as untimely. *See Slack*, 529 U.S. at 484. Accordingly, Salahuddin's motion for a COA is DENIED.

/s/ Kevin C. Newsom
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AUTLEY I. SALAHUDDIN, II,
GDC NO. 100403289,
Petitioner

v.

SCOTT WILKES, Warden, et al.,

Respondents.

CIVIL ACTION NO.

1:22-CV-5163-CAP

ORDER

This action is before the court on the report and recommendation ("R&R") of the magistrate judge [Doc. No. 2], which recommends dismissal because the petition is untimely. Also in the R&R, the magistrate recommends that the petitioner be denied a certificate of appealability. The petitioner has filed objections [Doc. No. 4].

Because the petitioner's federal habeas corpus petition was filed years after expiration of the statute of limitation set forth in 28 U.S.C. § 2244(d)(1), the magistrate judge determined it is time-barred. Furthermore, the magistrate judge rejected the petitioner's arguments for reopening his 2013

habeas corpus petition—a timely-filed petition challenging the same conviction that he seeks to challenge here.[1]

In his objections, the petitioner sets forth the merits of his habeas corpus petition and contends that he is actually innocent of the underlying criminal charges. "Actual innocence is not itself a substantive claim, but rather serves only to lift the procedural bar caused by [a petitioner's] failure timely to file" a habeas petition. *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005). To demonstrate actual innocence, a petitioner must "support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Here, the petitioner claims the new evidence he relies upon is the psychological evaluation that was excluded by the state trial court. This evidence is not new. In fact, the petitioner concedes that he has been challenging the exclusion of the evaluation since the trial judge's ruling years ago. Thus, there is nothing about this evidence—even assuming that it establishes actual innocence, which it likely does not—that could excuse the time bar that prevents the petitioner's filing of a federal petition challenging his 2010 conviction.

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[1] The 2013 petition was dismissed for failure to prosecute and failure to obey court orders. *See Salahuddin v. Valdosta State Prison*, No. 1:13-cv-1631-CAP (N.D. Ga. January 8, 2014).

The objections are overruled, and the court HEREBY ADOPTS the R&R [Doc. No. 2] as the order and opinion of this court. Because this court "has denied the certificate [of appealability], the applicant may request a circuit judge to issue the certificate." Fed. R. App. Pro. 22 (b)(1, 2). "Under the plain language of the rule, an applicant for the writ gets two bites at the appeal certificate apple: one before the district judge, and if that one is unsuccessful, he gets a second one before a circuit judge." *Jones v. United States*, 224 F.3d 1251, 1255 (11th Cir. 2000) (quoting *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996).

The clerk is DIRECTED to terminate this civil action.

SO ORDERED, this 26th day of April, 2023.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AUTLEY I. SALAHUDDIN, II, GDC No. 100403289, Petitioner, v. SCOTT WILKES, Warden, et al., Respondents.	: : : : : : : : :	PRISONER HABEAS CORPUS 28 U.S.C. § 2254 CIVIL ACTION NO. 1:22-CV-5163-CAP-JCF

FINAL REPORT AND RECOMMENDATION

Petitioner Autley I. Salahuddin, II, a state prisoner currently confined at Washington State Prison in Davisboro, Georgia, has filed a *pro se* 28 U.S.C. § 2254 habeas corpus petition challenging his 2010 Douglas County convictions and sentences for aggravated battery, aggravated assault, kidnapping, manufacturing marijuana, and possession of a firearm during the commission of a felony. (Doc. 1 at 1.) The $5.00 statutory filing fee having been paid, the matter is now before the Court for initial screening of the petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (hereinafter "Rule 4").

As background, Petitioner previously filed two § 2254 petitions challenging the same judgment of conviction. Petitioner executed[1] his initial petition on March 15, 2012. See Pet. [1], Salahuddin v. Danforth, No. 1:12-cv-1295-CAP (N.D. Ga. 2012). The state responded and moved to dismiss the petition for lack of exhaustion because Petitioner's application for a certificate of probable cause ("CPC") to appeal the denial of habeas relief was still pending before the Supreme Court of Georgia. Mot. [12], No. 1:12-cv-1295-CAP. Specifically, the state court record showed that a Douglas County jury convicted Petitioner on August 18, 2010, of aggravated battery, four counts of aggravated assault, three counts of kidnapping, violating the Georgia Controlled Substances Act, and three counts of possession of a firearm during the commission of a felony. See Resp. Ex. 1 [13-1] at 35, No. 1:12-cv-1295-CAP. The trial court sentenced Petitioner to a total of 50 years' imprisonment with 45 years to be served in custody. See id. On March 31, 2011, Petitioner filed a state petition for a writ of habeas corpus. See id. at 1. The state court dismissed the petition and

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[1] Under the federal "prison mailbox rule," a *pro se* habeas petition is deemed to be filed on the date it is delivered to prison authorities for mailing. Houston v. Lack, 487 U.S. 266, 275-76 (1988). Absent evidence to the contrary, the Court presumes a prisoner delivered his pleading to prison officials on the day it was signed. Garvey v. Vaughn, 993 F.2d 776, 780 (11th Cir. 1993).

Petitioner sought a CPC to appeal. Resp. Ex. 3 [13-3], No. 1:12-cv-1295-CAP. Petitioner's CPC application was still pending at the time of his first federal filing. Resp. Ex. 5 [13-5], No. 1:12-cv-1295-CAP. As a result, this Court granted the motion to dismiss and dismissed the § 2254 petition without prejudice for lack of exhaustion. See Order [17], No. 1:12-cv-1295-CAP.

The Supreme Court of Georgia's online records showed that Petitioner's CPC application was later dismissed on October 29, 2012. See Order [7], Salahuddin v. Valdosta State Prison, No. 1:13-cv-1631-CAP (N.D. Ga. Oct. 28, 2013). The remittitur was docketed in the state habeas court on December 4, 2012.[2] See Dockets, https://www.buttsclerkofcourt.com/WebCaseManagement/Imaging/ImageViewer.aspx?id=1000211811&caseid=2011-SU-V-0356&rectype=Civil&County=BUTTS%20COUNTY&Magistrate=no&UseSql=0&CaseLocator=3717&EventLocator=40623, searching for "2011-SU-V-0356" (last visited Mar. 28, 2023). Petitioner subsequently executed a second § 2254 petition on May 6, 2013. Pet. [1] at 6, No.

[2] The Court judicially notices the state court's online records in Case No. 2011-SU-V-0356. See Fed. R. Evid. 201; see also Paez v. Sec'y, Fla. Dep't of Corr., 947 F.3d 649, 652 (11th Cir. 2020) (noting that a district court may judicially notice online state court dockets).

1:13-cv-1631-CAP. This Court ultimately dismissed the second petition without prejudice on January 8, 2014, based on Petitioner's failure to prosecute and failure to comply with Court orders. See Order [10], No. 1:13-cvv-1631-CAP.

Now, nearly nine years later, Petitioner has executed a third § 2254 petition challenging his 2010 Douglas County convictions. (Doc. 1.) Petitioner apparently acknowledges that the present petition is time-barred, and instead asks the Court to revive his prior-filed petition in Case No. 1:13-cv-1631-CAP. (Id. at 13-14.) Petitioner contends that he was transferred and never received this Court's order of October 28, 2013, and was unaware until "recently" that his prior petition had been dismissed. (Id.) Petitioner "admits, in retrospect, that he should have filed a notice of change of address," and requests that this Court consider the prior-filed claims presented in Case No. 1:13-cv-1631-CAP on the merits. (Id. at 14.)

Rule 4 requires a court to dismiss a § 2254 petition "[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief." 28 U.S.C. foll. § 2254, Rule 4. Here, Petitioner's third § 2254 petition is due to be dismissed because it is apparent from the face of the petition that it is time-barred. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), § 2254 petitions are governed by a one-year statute of limitations that begins to run

on the latest of four triggering events, including "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A).

Because Petitioner did not pursue a direct appeal, his conviction became final on September 17, 2010. See O. C. G. A. § 5-6-38(a) (notice of appeal must be filed within thirty days after entry of judgment); Bridges v. Johnson, 284 F.3d 1201, 1202 (11th Cir. 2002) (holding that prisoner's conviction became final under § 2244(d)(1)(A) when the time for filing a direct appeal expired). Then 195 days of untolled time elapsed prior to Petitioner's filing his state habeas corpus petition on March 31, 2011. Assuming *arguendo* that the AEDPA clock was then tolled[3] until

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[3] The undersigned notes that it is somewhat unclear whether Petitioner's state habeas corpus proceedings in fact tolled the AEDPA deadline. The statutory tolling provision in 28 U.S.C. § 2244(d)(2) is only triggered when state postconviction applications are "properly filed," *i.e.* when the filing is delivered and accepted in compliance with applicable state laws and rules governing filings. Artuz v. Bennett, 531 U.S 4, 8 (2000). In his instant petition, Petitioner indicates that his state habeas corpus petition was rejected under the state pre-screening procedure for lack of exhaustion. (See doc. 1 at 3); O.C.G.A. § 9-15-2(d) (describing the procedure for denying filing of a pleading). Under these circumstances, the state petition was not "properly filed" within the meaning of § 2244(d)(2) and would not be entitled to any tolling effect. *See Pace v. DiGuglielmo*, 544 U.S. 408, 413-414 (2005) (holding that a state court's rejection of a postconviction petition as untimely conclusively

the Supreme Court of Georgia's remittitur from the denial of Petitioner's CPC application was docketed on December 4, 2012, Petitioner had 170 days, or, until May 23, 2013, to file a timely § 2254 petition.

Petitioner filed an apparently timely § 2254 petition in Case No. 1:13-cv-1631-CAP on May 6, 2013, and the AEDPA limitations period expired 17 days later on May 23. See Duncan v. Walker, 533 U.S. 167, 181-82 (2001) (explaining that prior federal § 2254 petitions do not toll the AEDPA limitations period). The prior petition in Case No. 1:13-cv-1631-CAP was dismissed without prejudice on January 8, 2014, due to Petitioner's failure to prosecute and failure to comply with Court orders. See Order [10], No. 1:13-cvv-1631-CAP. The instant third petition, executed on December, 19, 2022, was filed more than nine years and six months after the expiration of the AEDPA limitations period and is untimely. See 28 U.S.C. § 2244(d)(1)(A).

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established that it was not "properly filed" within the meaning of § 2244(d)(2)). However, as explained below, even assuming out of an abundance of caution that Petitioner's state habeas corpus proceedings did toll the AEDPA limitations period, and that his Petition in Case No. 1:13-cv-1631-CAP was consequently timely, the instant third petition is still time-barred by more than nine years.

Petitioner's request to revive his prior 2013 petition is unsupported by law. While the Supreme Court has recognized a limited mechanism by which a § 2254 petition may be stayed pending exhaustion, see Rhines v. Weber, 544 U.S. 269, 275 (2005), this Court explicitly found that a stay was unwarranted when it dismissed Petitioner's first § 2254 petition in Case No. 1:12-cv-1296-CAP. See R&R [15] at 4, No. 1:12-cv-1296-CAP, adopted by Order [17]. More importantly, the dismissal of the prior petition in Case No. 1:13-cv-1631-CAP, the one Petitioner seeks to revive, does not implicate Rhines in any way because the dismissal was for failure to prosecute and obey court orders, not lack of exhaustion. Cf. Rhines, 544 U.S. at 275. Because this Court explicitly declined to grant Petitioner a stay in Case No. 1:12-cv-1296-CAP, and because the dismissal in Case No. 1:13-cv-1361-CAP does not implicate Rhines, Petitioner is not entitled to return to this Court and reopen his prior proceedings. See id.

Fed. R. Civ. P. 60(b) cannot provide Petitioner with the requested relief, either. Petitioner does invoke any of the bases for relief set out in Rule 60(b) and has filed well outside the "reasonable time" for Rule 60 motions and the one-year time limit for motions under Rule 60(b)(1), (2), and (3). See Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2),

and (3) no more than a year after the entry of the judgment or order or the date of the proceeding."). Ultimately, Petitioner cannot circumvent the AEDPA time bar by attempting to reopen his prior § 2254 proceedings.

Petitioner does not allege any adequate basis for equitable tolling of the § 2254 limitations period. Cf. San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011) (explaining that the AEDPA's statute of limitations is non-jurisdictional and subject to equitable tolling); Holland v. Florida, 560 U.S. 631, 649 (2010) (holding that, to be entitled to equitable tolling, a petitioner must show both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing"). While Petitioner states cursorily that he only "recently" became aware of the dismissal of Case No. 1:13-cv-1361-CAP, he has not alleged, much less shown, that he exercised diligence in the nearly nine years since the prior dismissal. See Arthur v. Allen, 452 F.3d 1234, 1253 (11th Cir. 2006) (to demonstrate diligence, a petitioner must show that he took specific actions toward filing the petition, and that extraordinary circumstances "thwarted his efforts" to file a timely petition) (quotation marks omitted), affirmed in relevant part on rehearing, 459 F.3d 1310 (11th Cir. 2006); Perez v. Florida, 519 F. App'x 995, 997 (11th Cir. 2013) (per curiam) ("[W]e have not accepted a lack of a legal education and related

confusion or ignorance about the law as excuses for a failure to file in a timely fashion."); Cole v. Warden, 768 F.3d 1150, 1158 (11th Cir. 2014) ("The petitioner has the burden of establishing his entitlement to equitable tolling; his supporting allegations must be specific and not conclusory.").

Finally, Petitioner does not allege that he may proceed based on "actual innocence," nor has he presented new, reliable evidence of his factual innocence of the offenses of conviction. Cf. McQuiggin v. Perkins, 569 U.S. 383, 392 (2013) (holding that "a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief"); see also Schlup v. Delo, 513 U.S. 298, 324, 327 (1995) (holding that, to make a credible claim of actual innocence, a petitioner must present new reliable evidence that was not presented at trial showing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt").

Accordingly, because it is apparent that the instant § 2254 petition is time-barred, **IT IS RECOMMENDED** that this action be **DISMISSED** under 28 U.S.C. foll. § 2254, Rule 4. See Paez, 947 F.3d at 653-54 (holding that the district court did

not abuse its discretion in *sua sponte* dismissing a § 2254 petition as time-barred on initial review).

Under Rule 22(b)(1) of the Federal Rules of Appellate Procedure, a petitioner cannot appeal the final order in a habeas corpus proceeding "unless a circuit justice or a circuit or district judge issues a certificate of appealability ["COA"] under 28 U.S.C. § 2253(c)." Because reasonable jurists would not debate the procedural determination that the § 2254 petition is time-barred, **IT IS FURTHER RECOMMENDED** that a COA be **DENIED**. See Slack v. McDaniel, 529 U.S. 473, 484 (2000). If the District Judge adopts this recommendation and denies a certificate of appealability, Petitioner is advised that he "may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22." 28 U.S.C. foll. § 2254, Rule 11(a).

The Clerk of Court is **DIRECTED** to terminate the referral to the undersigned United States Magistrate Judge.

SO RECOMMENDED, this 28th day of March, 2023.

/s/ J. Clay Fuller
J. Clay Fuller
United States Magistrate Judge

In the

United States Court of Appeals

For the Eleventh Circuit

No. 23-11673

AUTLEY I. SALAHUDDIN, II,

Petitioner-Appellant,

versus

WASHINGTON SP WARDEN,
ATTORNEY GENERAL, STATE OF GEORGIA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:22-cv-05163-CAP

Before JILL PRYOR and NEWSOM, Circuit Judges.

BY THE COURT:

Autley Salahuddin, II, has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's September 22, 2023, order denying his motion for a certificate of appealability, following the district court's dismissal of his 28 U.S.C. § 2254 petition. Upon review, Salahuddin's motion for reconsideration is DENIED because he has offered no meritorious arguments to warrant relief.